Moreover, even where it is available, the dialing ease will in many cases be offset by the need to interface with two operators in order to complete an operator assisted call, which many callers are likely to find confusing and inconvenient.

The most serious problems of this nature arise with respect to so-called "0+—" dialed calls, such as collect calls, bill-to-third number calls and person-to-person calls. For each of these call types, callers would have to provide information to both the LEC and the IXC in order to complete a call under BPP.

The *FNPRM* assumes that the deployment of Operator Service Switch Number 7 ("OSS#7") and Automated Alternate Billing Service ("AABS") systems would provide technical solutions enabling LECs to collect and send automatically all necessary call information to the billed party's preselected IXC. This assumption ignores practical realities. The OSS#7 functionality required for transport of billing information between operator service switches is still unavailable. Further, even if the LEC receiving the billing information has OSS#7 capability, there is the distinct possibility that the OSP may not be able to receive it. The *FNPRM* acknowledges that "[i]f the OSP could not

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[41](...continued)

In contrast, if BPP were implemented, *all* OSP calls would be adversely affected. As explained in this and the next subsection, a considerable fraction of calls would suffer the added inconvenience of two operators, and BPP would increase set-up times considerably. Thus, it appears that the relative potential benefits of increased ease of dialing under BPP are grossly overstated in the *FNPRM*.

receive OSS#7 data, it would need to request billing information from the caller again."[42]

Similarly, it is not clear from the *FNPRM* to what extent the AABS systems in place today are designed exclusively for LEC applications, and will need to undergo modification to operate in a BPP environment. The record developed earlier in this proceeding suggests that "significant modifications" would be needed.[43] Wherever OSS#7 is not available, the chosen OSP would not receive OSS#7 data, and wherever AABS was not configured to handle BPP traffic, significant interaction with two operators still will be required.[44]

Even if these two technologies are deployed ubiquitously for BPP, the double operator problems experienced in the placement of "0+—" calls under a BPP system will not be eliminated. An AABS system modified for BPP operations would merely replace the front-end LEC operator with a robotic operator. As the *FNPRM* indicates, the AABS system would prompt the caller to enter digits identifying a call type, the

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[42] *FNPRM* ¶ 6.

[43] Comments of Ameritech, CC Docket No. 92-77, at 14 (filed July 7, 1992).

[44] As US West explained succinctly, without OSS#7 and AABS, "a caller would have to provide *verbally* the same information twice (*i.e.*, the calling telephone number, the called telephone number, the telephone number to be billed). For collect, bill-to-third number and person-to-person calls, the caller would have to provide additional information to the IXC operator. In addition, for calling card calls, the caller would have to enter his or her account number once for the originating LEC and again for the chosen IXC." US West Comments, CC Docket No. 92-77 at 7 (filed July 7, 1992) (emphasis in original) ("US West Comments").

called number, and necessary account information.[45] The proposed OSS#7 system would then transport the numeric information collected by AABS from the LEC operator service switch to the OSP.

If developed and implemented successfully, such a system could eliminate the need for two operators on "0++" dialed calling card calls, but it would not alleviate the two-operator set-up for "0+—" dialed calls. The simple reason is that AABS will not record and transmit any information which is provided by callers verbally. Thus, on collect calls, the caller's name will still need to be provided verbally, requiring the caller to deal separately with the OSP operator after getting past the LEC AABS system. Similarly, the names of both the caller and called party are required by the IXC to complete person-to-person calls. Further, verbal clearance is usually required from the billed party to complete a bill-to-third-party number call. For each of these call types, therefore, callers will be required to provide information to a LEC operator and a separate IXC operator.

Moreover, the fact that the LEC AABS operator might be robotic does not change this undesirable aspect of BPP. The customer will still be required to interact with two distinct operator service systems. Not only will this substantially delay call

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[45] *FNPRM* ¶ 7 n.13.

completion and be frustrating to the public,[46] which is used to interacting with one operator, it is likely to prove confusing as well.

As CompTel explained in its earlier Reply Comments,[47] the call types which would entail some degree of double operator processing under BPP, even if OSS#7 and AABS are fully deployed, represent a large proportion of all operator services calling. While the exact percentage of calls affected may vary from carrier to carrier, it is clear that the impact is very substantial, and end users making such calls are likely to become both confused and angered by the necessity of dealing with two operator systems.

C. BPP Would Increase Access Times for Completing "0+" Calls, Offsetting Any Potential Gains in Dialing Ease.

As CompTel demonstrated earlier in this proceeding, all "0+" calls would take significantly longer to process under BPP than they do today, offsetting any perceived gain in dialing convenience.[48] The interposition of the LEC operator system, the ascertainment of the billed party's preferred carrier, and the transfer of the information

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[46] The record developed earlier in this proceeding indicated that callers can and do elect to bypass AABS systems entirely to reach a live operator. This happens, for instance, when callers are confused, unaware of their options, or simply prefer dealing with humans over machines. On such occasions callers in a BPP environment would have to provide call information verbally both to the live LEC operator and subsequently to the IXC operator.

[47] CompTel Reply Comments at 18-19.

[48] *Id.* at 19-22.

collected to the preselected IXC all add access time to the call processing sequence that will be readily perceived by callers.

First, the caller must select a call type and enter other information from the LEC's AABS menu. The record developed to date suggests that this step adds from two seconds (for a LEC calling card) to 20 seconds (for a bill-to-third number call) depending upon the call type and the caller's familiarity with the particular LEC's AABS.[49] Second, a LIDB query must be launched to ascertain the billed party's preferred carrier, which can add an additional several seconds before timing out. Finally, according to US West, the OSS#7 transfer of information from the LEC OSS to the IXC OSS adds an additional two to five seconds.[50] US West estimated that these elements combined add 6-30 seconds to the processing of "0+" calls under BPP, as compared to the present access code system.

The *FNPRM* discounts this set-up period by suggesting that callers would be receiving instructions from the LEC during the call set-up period.[51] It is far from clear on the record developed to date whether BPP customer instructions will be given during call processing begins as opposed to *before* call processing. Even if instructions are given during call set-up, the length of time to process the call will not itself be

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[49] Bell Atlantic estimates that the *average* processing time for AABS under billed party preference would be 22 seconds. Comments of Bell Atlantic, CC Docket No. 92-77, Attachment A at 3 (filed July 7, 1992).

[50] US West Comments at 13.

[51] *FNPRM* ¶ 31 & n.51.

diminished. This fact is particularly germane where the caller is already familiar with the LEC's system. Moreover, no instructions will be given during transfer to the IXC and call set-up.

Further, CompTel submits that the *FNPRM* analysis puts undue emphasis on the fact that BPP will eliminate the need to dial access codes. As discussed herein, access codes are used on about 30 percent of operator assisted calls.[52] In contrast, the access times associated with BPP will affect 100 percent of "0+" calls. For the large majority of operator service calls which already are placed on a non-dial-around basis, the 6-30 second increase in access time is entirely incremental to the current system. Even where access codes are used, their entry takes less time than the additional time required to process calls under BPP.[53]

This call processing delay also represents another significant cost of BPP which was not considered by the *FNPRM* -- added network expense. The 6-30 additional seconds of access time for BPP call processing will be charged to the IXC and passed on to the consumer. When added to every call, this increased access expense will be very substantial.

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[52] *Supra*, note 41.

[53] *See* CompTel Reply Comments at 21.

D. BPP Will Frustrate Implementation of Service Enhancements to Users of Operator Services.

In addition to increased complexity and longer set-up times, BPP will, for all practical purposes, prevent the deployment of many new "0+" service offerings and features, and preclude the future development of such enhancements. As CompTel explained in its Reply Comments, the record reveals a host of services that would be incompatible with BPP: voice recognition call processing technology for collect and third-party-number-billed calls; use of voice PINs on calling card calls; "0+" voice mail and message forwarding; personal speed dialing; "0+" access to information databases; and use of commercial credit cards to charge "0+" calls.[54] This result will inconvenience consumers who have come to rely on these improvements and reduce "0+" competition by making it more difficult for IXCs to compete for business based upon the development of other attractive service features.

The problem is, as OSS#7 and AABS are deployed to facilitate BPP, OSPs will be able to receive only the numeric information collected by the LEC from the caller. No additional numeric information can be collected on the "front end" of the call to accommodate use of OSP voice services. Voice applications are entirely precluded. Aware that BPP will stifle the use of these technologies, the *FNPRM* attempts to downplay the severity of the effects by suggesting that callers will merely need to

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[54] CompTel Reply Comments at 22-23.

bypass BPP in order to use such services, by pressing the "#" key, for example.[55] This solution merely trivializes the problem that will be created for these new technologies. Such an awkward method of accessing these functionalities, forced upon callers as a result of BPP implementation, is likely to dissuade their use altogether.

As a result, these important service innovations realistically must be anticipated as lost due to BPP implementation. This loss, along with all the other costs described herein, must be weighed against the dubious benefits afforded by the proposed BPP system.

E. End Users Are Already Accustomed To the Current Access Code System.

The FCC also must consider the effect of its current regulations before adopting BPP. Thanks to Congress and earlier actions by the FCC, consumers have largely learned how to determine the presubscribed carriers at individual locations and how to access their preferred carrier directly, if it is different, through the use of an access code. The success of national marketing campaigns such as 1-800-CALL ATT and 1-800-COLLECT[56] are two indications of this fact. Given that BPP is unlikely to be

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[55] *FNPRM* ¶ 33.

[56] *See, e.g., The Marketers' Call: MCI's Ad Agency Plays a Crucial Role in Creating Product and Pitch*, Wash. Post, June 26, 1994, at H1 (AT&T representative states that discount collect-calling volume doubled in April 1994 and rose 20 percent since then); MCI Communications Corporation, 1993 Annual Report at 12, 27 (commenting on the success of 1-800-COLLECT service).

deployed for several years, end users will be even more comfortable with the existing system by the time BPP is available. Conversely, they will be that much more confused and inconvenienced if BPP is implemented at that time. Because current regulations effectively achieve the objectives to be served by BPP, it seems questionable, at best, to introduce the drawbacks associated with BPP at the tremendous cost even conservative estimates suggest.

F. To Enable Corrective Institutions to Effectively Combat Fraud and Other Abuses, the FCC Should Exempt Inmate Payphones from BPP Requirements.

The Commission asks for comment on whether to exempt inmate telephones from BPP, "particularly with respect to the effectiveness and costs of controlling fraud on inmate lines with or without BPP."[57] As CompTel explained in its earlier Reply Comments, correctional institutions have specialized requirements that presubscription can, and already does, address, but which would not be accommodated effectively under BPP.[58] Plain and simple, inmate telephones must be blocked to certain numbers, be restricted differently with respect to different inmates, and must provide detailed call reports to minimize the potential for toll fraud, harassing calls, and other criminal activity.[59] Specialized payphone equipment can best achieve these needs;

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[57] *FNPRM* ¶ 51.

[58] CompTel Reply Comments at 28-29.

[59] *Id.*

and, indeed, many if not most institutions have already reached this conclusion and invested in such equipment.

If BPP were imposed on inmate phones, these effective solutions would be banned and correctional institutions would not have the control over inmate calling they require. That the *FNPRM* reflects a misunderstanding about the needs for such control is evident from its suggestion that an anti-fraud service whereby LECs signal OSPs if a "suspicious" number of collect or third number calls were directed to a particular phone number could adequately serve the needs of correctional institutions.[60]

V. THE *FNPRM* OVERSTATES THE SCOPE OF THE PROBLEM AND DOES NOT ADEQUATELY CONSIDER LESS COSTLY ALTERNATIVES TO BPP

The *FNPRM* identifies three basic areas where BPP has the potential to bring benefit. First, BPP will purportedly allow more end users to reach their carrier of choice. Second, the *FNPRM* asserts that BPP will ensure that rates are reasonable. Third, the *FNPRM* states that BPP will confer increased dialing convenience on end users. The great majority of callers already enjoy all these benefits, however. In each case, even if effective, BPP will provide any added value to only a fraction of "0+" and "0—" calls. BPP is a blunderbuss solution to a relatively narrow "problem."

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[60] *FNPRM* ¶ 51.

A. End Users Are Reaching Their Carriers of Choice.

In a study commissioned by CompTel and completed in late 1993, Frost and Sullivan, Inc., found that, in 1991, over 80% of all operator services and access code calls were being billed by the billed party's carrier of choice. Specifically, at most, only 19 percent of all operator services calls made two years ago could potentially have "benefitted" from BPP, from the standpoint of the calls being routed to the billed party's carrier of choice when they otherwise would not have been.[61] Presumably, by the time BPP could be implemented in 1996-97, that number would be significantly smaller because end users would be even more familiar with the access codes of the carriers of their choice and more phones from aggregator locations will have been unblocked. Indeed, it was only after the period studied by Frost & Sullivan that the FCC finally required aggregator locations to unblock all 10XXX access codes.[62] That the frequency with which billed parties are having calls carried by the carrier of their choice is increasing is supported by the fact the number of informal complaints received by the Commission concerning blocking of access to IXCs has dropped by 50

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[61] *Frost & Sullivan*, *supra* note 22, at 1, 14-15.

[62] *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, 7 FCC Rcd 4355 (1992) (Order on Reconsideration) ("10XXX Unblocking Order") (payphone owners required to unblock 10XXX access no later than January 10, 1993 depending on availability of LEC blocking and screening services), *clarified*, 8 FCC Rcd 2863 (1993).

percent since 1992.[63] Further signs of the success of access codes are the success of programs such as 1-800-COLLECT and 1-800-CALL ATT.[64]

B. Most "0+" Calls Are at Reasonable Rates.

In the *FNPRM*, the Commission implies that the average per minute rate for operator service calls handled by AT&T, MCI and Sprint is reasonable.[65] In the FCC's TOCSIA Report, the Commission's Industry Analysis Division found that, in 1991, these carriers and the LECs (RBOCs) carried 91.8 percent of all IXC operator services call minutes (both intrastate and interstate).[66] Other OSPs were found to carry only 8.2 percent of call minutes. If the assumption is made that the rates charged

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[63] This is borne out by the complaints received by the Commission. The number of complaints filed regarding call blocking *dropped* by almost 50 percent from 1992 to 1994. *See* Informal Complaints Branch, Complaint Subject Reports for 11/1/91-4/30-92 and 11/1/93-4/30/93. Interestingly, it would appear that the increase of OSP complaints noted by the Commission, *FNPRM* ¶ 16, n.31, is less a reflection of general complaint about OSPs than the apparent increased propensity of the American public to file complaints. In fact, over the 1992 to 1994 period (again focusing on the November through April time periods) the number of non-OSP complaints received by the FCC increased by almost 240 percent, whereas OSP-related complaints increased at the relatively low rate of approximately 30 percent. This relatively small increase is particularly significant given the recent requirement to post the name of the presubscribed OSP and to give the FCC's address and instructions for making a complaint at all public telephones.

[64] *See* note 56, *supra*.

[65] *FNPRM* ¶ 11 n.24.

[66] TOCSIA Report, Attachment N at 17, Table 4.

by the LECs are reasonable as well, then BPP would address a rate problem affecting, at most, only 8.2 percent of all operator services call minutes.

Of course, this assumes that not a single IXC other than AT&T, MCI, Sprint and the LECs ever charges reasonable rates for operator-assisted calls. In a conclusion that is fundamentally at odds with the *FNPRM*, and indeed calls into question why this proceeding remains open, the Commission's 1992 TOCSIA Report found that "the vast majority of all OSPs, large and small, charge rates that are close to the industry average,"[67] and "the average sample charge is trending downward."[68] Thus, in all likelihood, the segment of the market charging rates materially above AT&T, MCI, Sprint and the LECs is likely to be significantly less than 8.2 percent of all operator services call minutes.

Even if one makes the extreme assumption that all calls using other providers of operator services are at unreasonable rates, the potential scope of the relief from unreasonable rates provided by BPP is even less if one incorporates the assumption made in the *FNPRM* regarding the market share held by these other OSPs. The *FNPRM* assumed that one-third of the "other OSP" market share would be lost by

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[67] TOCSIA Report at 32.

[68] *Id.* at 22. Also supporting the conclusion that OSP rates are generally reasonable is the finding in the TOCSIA Report that OSP profit margins are small, and that almost 95 percent of revenues, on average, go to cover operating expenses. *Id.* at 18.

1997.[69] If so, in three years, from the standpoint of ensuring reasonable rates, BPP will address only 5.5 percent of all operator assisted calls.

These estimates become even smaller if BPP is implemented only for interstate calls, as tentatively proposed. Looking at the TOCSIA Report numbers for 1991, 63.7 percent of operator services revenue overall came from interstate calls, whereas only 52.5 percent of the revenues of "other" OSPs came from interstate calls. Applying these percentages to the total minutes for each group of carriers, only 7.1 percent of operator services calls came from OSPs within the group that may be charging unreasonable rates. Assuming these carriers lose one-third of their market share by 1997, only 4.7 percent of all call minutes, at most, will be at potentially higher them AT&T, MCI and Sprint.

In short, while BPP may be able to ensure that more calls are at reasonable rates, by 1997, a *minimum of 95 percent* of all calls can be expected to be at

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[69] *FNPRM* ¶ 11 n.24.

"reasonable" rates *without BPP.*[70] Thus, when properly analyzed, BPP is a tremendously expensive solution to a very narrow problem that is diminishing in scale.

C. There Are Less Costly Alternatives to Allow Callers to Reach Their Carriers of Choice.

As shown above, the large majority of all callers already use the carrier of their choice when placing a "0+" call. With the availability of the protections created by Congress and the FCC in recent years, consumers now have adequate information about the OSP presubscribed to each telephone. OSPs are required to provide specific verbal brands before completing a call[71] and are required to post the name of the OSP serving the phone.[72]

Should the caller wish not to place the call using the presubscribed OSP, Congress and the FCC have also established methods by which end users can reach the carrier they would like. As required by TOCSIA, the FCC has adopted rules requiring

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[70] Another way to assess the minuscule scope of the alleged problem to be addressed by the FCC is to look at the relatively small number of informal complaints received by the Commission regarding rates charged by OSPs. If one assumes that the number of complaints received by the FCC from April to September 1991 regarding rates, 526, were one-half of those received in 1991, then the FCC received one complaint for every 157,000 interstate calls ((2.2 billion minutes x 0.525 interstate minutes per minute)/1052 complaints about rates/7 minutes per call= 156,844 interstate calls per complaint). If all OSP interstate traffic is included, the complaint rate falls to one per 2,200,000 calls ((25.5 billion minutes x 0.637 interstate minutes per minute)/1052 complaints about rates/7 minutes per call= 2,205798 interstate calls per complaint).

[71] 47 C.F.R. § 64.703(a).

[72] *Id.* § 64.703(b).

all OSPs to provide "950" and "1-800" access numbers for their customers to reach them and has required aggregators to unblock all carrier "10XXX" access codes.[73] In light of these protections, the level of dial around calling to date suggests that many "0+" callers that do not choose an OSP other than the presubscribed one do not necessarily care to do so.[74]

In short, to the extent there are residual concerns about callers reaching the carrier of their choice, the protections of TOCSIA and the Commission's regulations should be permitted to do their job. As the FCC concluded in the TOCSIA Report:

> As 10XXX unblocking proceeds . . . and as consumers become increasingly familiar with these options, dial around traffic will increase. This behavior will help counter any residual market impact of the diminishing segment of the operator service industry that charges unusually high rates. . . . In short, [the] consumer's ability to exercise choice is the best regulator of OSP rates.[75]

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[73] *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, 6 FCC Rcd 4736 (1991) (all providers of operator services required to establish "800" or "950" access code numbers), recon., *7 FCC Rcd 4355 (1992)*, clarified, *8 FCC Rcd 2863 (1993); 10XXX Unblocking Order*, 7 FCC Rcd 4355 (FCC lifted stay of requirement that aggregators unblock 10XXX access codes).

[74] That this is so is supported by the fact that millions of "1+" calls are made from hotels and motels by guests that do not know the rates nor the service provider to be accessed.

[75] TOCSIA Report at 31.

D. The Small Percentage of Calls That Are Priced Substantially Above the Industry Average Can Be Controlled Through the Use of Rate Benchmarks.

As the earlier discussion demonstrates, only a tiny percentage of operator assisted calls are priced at rates that may be unreasonable. Indeed, by the time BPP could be implemented, that number is likely to be far lower than it is today. However, to the extent there is a residual segment of calls that are still at rates substantially greater than the industry average and the Commission determines that the marketplace alone is insufficient to regulate these rates, the Commission could choose to establish benchmark rates. OSPs would be required to cost justify above the benchmark, while rates at or below the benchmark would be presumed lawful. A benchmark approach would be literally billions of dollars less costly to implement than BPP. Given the small scope of the perceived rate problem, as outlined above, this solution makes far more sense than a $2 billion BPP plan.

The Commission has the authority and regulatory flexibility to set an industry benchmark at or below which rates would be presumed to be lawful, and above which the FCC would subject the rates to an investigation to determine their lawfulness. Specifically, Section 226(h)(2) of TOCSIA gives the FCC the power to review operator service charges and take steps to ensure they are just and reasonable.[76] Beyond TOCSIA, benchmarks are also consistent with the general ratemaking authority given to

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[76] 47 U.S.C. § 226(h)(2).

the Commission by the Communications Act.[77] Section 205(a) of the Act, for example, gives the Commission authority, to prescribe just and reasonable charges for a common carrier service whenever it concludes that any charge may be unjust or unreasonable.[78] More generally, the Act gives the FCC broad authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Communications Act.[79]

It is clear that the Commission has the statutory flexibility to implement regulation in whatever form it deems appropriate to ensure reasonable rates for common carrier operator services, provided that the rate regulation is otherwise in conformity with constitutional requirements.[80] In fact, the U.S. Supreme Court has explained:

> The Court has said that the "legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as the determination itself." It follows that rate-making agencies are

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[77] *See id.* § 226(i) (TOCSIA does not alter the powers or duties of the Commission under the Communications Act).

[78] *Id.* § 205(a). The Commission may initiate the hearing on its own initiative. *Id.*

[79] *Id.* § 201(b). Section 4(i) further provides the "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." *Id.* § 154(i).

[80] *See Railroad Commission Cases*, 116 U.S. 307, 331 (1886) ("This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. . . . [The government cannot] do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law.")

> not bound to the service of any single regulatory formula; they are permitted, unless their statutory authority otherwise plainly indicates, "to make the pragmatic adjustment which may be called for by particular circumstances."[81]

The Communications Act does not "plainly indicate" what form of rate regulation the FCC can adopt in this instance. As to price ceilings generally, they have been "customary from time immemorial,"[82] and the U.S. Supreme has routinely upheld their use.[83]

In *Permian Basin*, the Court found statutorily and constitutionally permissible maximum established rates that applied to all producers of natural gas in the Permian Basin in the Southwestern U.S. The ratemaking authority of the Federal Power Commission ("FPC") under its enabling statute was very similar to that of the FCC under the Communications Act,[84] as outlined above. The Court reiterated that it "has repeatedly recognized that legislatures and administrative bodies may calculate rates for

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[81] In re *Permian Basin Area Rate Cases*, 390 U.S. 747, 776-77 (1968) (quoting *Los Angeles Gas Co. v. Railroad Comm'n*, 289 U.S. 287, 304 (1933); *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942), other citations omitted) ("*Permian Basin*").

[82] *Munn v. Illinois*, 94 U.S. 113, 133 (1876).

[83] *Bowles v. Willingham*, 321 U.S. 503 (1944).

[84] *Compare* Section 5(a) of the Natural Gas Act ("NGA") 15 U.S.C. § 717d(a) (quoted in *Permian Basin*, 390 U.S. at 754 n.1) *with* Section 205(a) of the Communications Act, 47 U.S.C. § 205(a). Moreover, like the Commission under Section 4(i) of the Act, the FPC had authority to "perform any and all acts, and to prescribe . . . such orders, rules, and regulations as it may find necessary to carry out the provisions" of the NGA. 15 U.S.C. § 717o. *See also Permian Basin*, 390 U.S. at 776 n.40.

a regulated class without first evaluating the separate financial position of each member of the class."[85]

Mindful that such maximum rates must be in conformity with constitutional limitations that prevent confiscatory rates, the Court in *Permian Basin* found nevertheless that it need not address whether the regulated companies "must, under the Constitution, be proffered opportunities either to withdraw from the regulated activity or to seek special relief from the group rates."[86] The issue was not raised because, under the FPC regulations, a gas producer could seek "appropriate relief" if its "out-of-pocket" operating expenses exceeded its revenues under the applicable maximum rate. The Court made this determination even though, in the same cases, the producer might not recover its unsuccessful exploration costs or a full 12 percent return on its production investment.[87]

The FCC benchmark rate regulation suggested herein by CompTel is in line with the requirements of *Permian Basin*. If the FCC determines that, in these "particular circumstances," the public interest requires action to address the five percent (or less) of operator services calls whose rates exceed the industry average, CompTel urges the initiation of a proceeding to establish an appropriate benchmark

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[85] *Permian Basin*, 390 U.S. at 769. If maximum rates are adopted, the regulatees cannot complain of a constitutional violation even if the rate regulation impacts different carriers differently. *See Bowles v. Willingham*, 321 U.S. 503.

[86] *Permian Basin*, 390 U.S. at 770.

[87] *Id.* at 770-71.

based upon operating costs in the OSP industry, as well as procedures by which OSPs could justify higher rates. In fact, this approach would be less of a regulatory imposition than the rate prescription found acceptable in *Permian Basin*.

Benchmark rates should be established upon a record reviewing data on the investment and costs associated with providing operator services. Prices at or below the benchmark would be presumed lawful. Operators that choose not to price under the benchmark would have the opportunity to justify higher rates, just as the producers in *Permian Basin* could justify relief from the maximum rate in that case. CompTel does not address here what particular standards should govern such a review. The Commission is, of course, well versed on the constitutional constraints on rate regulation:

> Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of [the Constitution].[88]

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[88] *Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n*, 262 U.S. 679, 690 (1923). *See also Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) (return on equity must be "sufficient to assure confidence in the financial integrity of the enterprise" so that its credit is maintained and capital may continue to be attracted); *Permian Basin*, 390 U.S. at 792 (rate must "maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed").

Rate regulated entities thus must be allowed to "earn enough revenue not only to cover operating expenses but also to pay for the capital costs of doing business, including service on debt and dividends on stock."[89]

Provided these general rate regulation principles guide the standards that apply when OSPs seek to justify higher than benchmark rates, benchmark regulation as described herein will certainly pass any constitutional challenge.[90] Just as important, from the perspective of the FCC's objectives to ensure reasonable rates, benchmark regulation will be far less onerous and costly than BPP. And it will provide a regulatory approach tailored to deal with the small fraction of calls where such intervention is necessary, rather than imposing a wide-ranging new system on all calls.

The effectiveness and administrative ease of using this benchmark approach for operator services has already been demonstrated by the Commission.[91] Two years

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[89] *United States v. FCC*, 707 F.2d 610, 612 (D.C. Cir. 1983). *See also D.C. Transit System v. Washington Metro Area Transportation Comm'n*, 350 F.2d 753, 778 (D.C. Cir. 1965) ("rate fixed without particularized reference to [debt service and other] needs does not satisfy any standard of rate making of which we are aware").

[90] *See Permian Basin*, 390 U.S. at 770-72.

[91] Under TOCSIA, Congress gave the FCC specific authority to impose a rate ceiling on OSP rates and compensation paid to aggregators. That authority arguably has passed. (Section 226(h)(4)(A) required the Commission to complete any rulemaking proceeding to establish regulations to ensure that OSP rates are just and reasonable within 180 days of the preparation of the TOCSIA Report. 47 U.S.C. 226(h)(4)(A).) Nonetheless, the existence of that authority provides further precedent for the Commission to use a benchmark. In the legislative history of TOCSIA, Congress explicitly recognized the FCC's authority to adopt benchmark rates under Section 226(h)(4), 47 U.S.C. § 226(h)(4), if the FCC found that market forces were not securing rates and charges that were just and reasonable. Sen. Rpt. 101-439, 101st

(continued...)

ago, the Commission announced a number of investigations against OSPs because their reported rates exceeded charges for "calls that are typical of operator assisted calls handled by [AT&T]," and therefore appeared to be unreasonable.[92] While not endorsing this standard as appropriate in this case should the FCC adopt a benchmark,[93] CompTel raises this example to show that the FCC has endorsed the use of the type of benchmark suggested herein: rates at or below the benchmark would be presumed lawful; those above the benchmark should be set for investigation in which the IXC can seek to demonstrate why they are just and reasonable.

Similarly, the Commission has recently adopted cable rate regulations that employ a benchmark approach. Under the new regulations, each cable operator may choose to set its rates at or below a benchmark based on non-cost characteristics of the

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[91](...continued)
Cong., 2d Sess. (1990) *reprinted in* 1990 U.S.C.C.A.N. 1577, 1600-01. Congress noted that the rate ceilings, if adopted, should be "based upon the rates charged by the largest OSP" but need not be equal to those rates. Rather, they could be a certain percentage above or below those rates, as the Commission determined was reasonable. *Id.* Indeed, because Section 226(h)(4)(B) specifically talks about "limitations" on "compensation given to aggregators" as a means of addressing rates found to unreasonable, it would appear that Congress anticipated that benchmarks would be an appropriate method to address unreasonable rates, rather than some much more costly mechanism such as BPP.

[92] *See, e.g., American Network Exchange, Inc.*, 7 FCC Rcd 163, 163 (1992). *See id.* at 163 n.1 (as part of reporting requirements established by the Commission, each OSP, including AT&T, priced out ten sample calls of eight minutes duration at two specific distances and at different times of day).

[93] CompTel questions whether any further regulation to reduce OSP rates is needed at this time or that OSP rates should be tied to the rates of one competitor.

system and they would be presumed lawful.[94] Alternatively, they may choose to justify rates higher than the benchmarks through a cost-of-service proceeding. Despite some difference, at its heart this structure is very similar to what CompTel believes the Commission should implement in the event it believes that some OSP rates still may be unreasonable and would be regulated.

In sum, rather than implementing BPP to address a small percentage of all operator service rates that may be unreasonable, the FCC should use benchmarks to ensure reasonable rates. Without a doubt, the FCC has statutory authority to utilize such regulations; and, if properly implemented, benchmarks combined with the opportunity for IXCs to justify higher rates would be immune from constitutional challenge.

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[94] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, FCC 94-38 (Mar. 30, 1994). The benchmark could be established in either one of two ways, whichever yielded a higher rate level for the cable operator. The cable operator could apply an industry-wide formula using as inputs the characteristics of its particular system, which excludes costs and prices. Alternatively, the operator could take its system's prices as of a date certain (September 30, 1992) and reduce them by a "competitive differential" of 17 percent, which the FCC concluded fairly represented the industry-wide difference between rates of competitive and non-competitive cable systems.

VI. IN THE EVENT BPP IS ADOPTED DESPITE THE COSTS, CERTAIN ASPECTS OF THE IMPLEMENTATION MUST BE MODIFIED

If the FCC decides to overlook the tremendous costs of and problems with BPP and implement it nonetheless, the deployment of BPP must include certain elements. Namely, end users must be able to select both their primary and any secondary carriers to ensure that the system is truly one of the billed party's preference. To achieve the benefit of nationwide uniformity, intraLATA calls must be covered by the BPP system. To further competition to the extent possible, 14-digit screening must be mandatory. Finally, to ensure that those who purportedly will benefit from BPP pay for the service, cost recovery must be placed on BPP calls only. Only if these steps are taken can BPP remain consistent with the FCC's stated goals and well-established cost recovery policies.

A. Full Balloting Must Be Required.

CompTel supports the tentative conclusion in the *FNPRM* that "if BPP is implemented, each LEC will be required to notify its subscribers of their right to choose a "0+" carrier and to provide all subscribers with a ballot for doing so."[95] BPP would undermine many IXCs' base of premises owner customers. These would have to be replaced completely under the proposed BPP system. As CompTel has

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[95] *FNPRM* ¶ 65.